64726-1

REC'D

JUL 21 2010

King County Prosecutor
Appellate Unit

~~64726-1~~

~~85949-7~~

85789-0

NO. 64726-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GEORGE RYAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard Eadie, Judge

BRIEF OF APPELLANT

HARLAN R. DORFMAN
CHRISTOPHER H. GIBSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

RULES, STAUTES AND OTHER AUHTORITIES

A. ASSIGNMENTS OF ERROR

1. The court violated Appellant's right to present a complete defense when it limited cross-examination of the complainant.

2. The court erred by instructing the jury it had to be unanimous in order to reject the special verdict findings requested by the State regarding use of a deadly weapon and aggravating circumstances for sentencing. CP 79 (Instruction 18).[1]

3. The court failed to enter written findings and conclusions in support of its exceptional sentence.

Issues Pertaining to Assignments of Error

1. In an assault and felony harassment trial involving people with a history of domestic violence, the State was allowed to introduce evidence of several instances of assaultive behavior by Appellant to demonstrate his motive, assess the reasonableness of complainant's fear and/or apprehension, and assess the complainant's credibility. The evidence was also admitted to support the domestic violence ongoing pattern of abuse aggravating factor allegation. Defense counsel wanted to cross-examine the complainant regarding an incident in which she stabbed Appellant. The court reserved ruling. After the complainant testified she was helpless against Appellant, counsel again sought cross-examination

about the stabbing incident, citing three relevant bases: (1) as a context for assessing the complainant's degree of reasonable apprehension/fear; (2) to impeach the complainant's assertion of helplessness; and (3) as motivation for the complainant to fabricate. The court denied the request. Did the court violate Appellant's right to present a complete defense?

2. Did the trial court err by instructing the jury it had to be unanimous before entering "no" on the deadly weapon and aggravating circumstance special verdict forms when the Washington Supreme Court has repeatedly held this constitutes error?

3. Because the jury's special verdict findings below were based on an erroneous instruction, should the deadly weapon sentencing enhancement and exceptional sentence be reversed?

4. If this Court does not reverse Appellant's conviction or the exceptional sentence, then is remand still necessary so the trial court can enter the statutorily required written findings and conclusion in support of the exceptional sentence?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged appellant George Ryan with second degree assault with a deadly weapon - domestic violence and felony harassment -

[1] A copy of the instruction is attached as Appendix A.

domestic violence, including a deadly weapon enhancement, both allegedly committed June 17, 2009 against Evette[2] White. Supp. CP (sub no. 39, Amended Information (11/9/09); RCW 9A.36.021(1)(c);[3] RCW 9A.46.020(1), (2).[4] Both counts also alleged the domestic violence ongoing pattern of abuse aggravating factor under RCW 9.94A.535(h)(i).[5]

---

[2] In the original Information, White's first name was spelled "Yvette," and that spelling was used throughout the report of proceedings. CP 1-4. When the State amended the information, however, that spelling was corrected to "Evette." Supp. CP ___ (sub no. 39, Amended Information (11/9/09)). Without any disrespect intended, this brief will refer to the complainant simply as "White."

[3] RCW 9A.36.021(1)(c) – Assault in the Second Degree – provides:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> . . . .
>
> (c) Assaults another with a deadly weapon[.]

[4] RCW 9A.46.020(1), (2) – Harassment – Definitions – Penalties – provides in part:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened[;] . . . and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.
>
> . . . .
>
> (2)(b) A person who harasses another is guilty of a class C felony if . . . (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

[5] RCW 9.94A.535(3)(h)(i) provides:

> Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. . . .

Pre-trial, the court found admissible Ryan's statements to police and a knife found during a search incident to arrest. CP 50-54; 1RP 218-23.[6] The court also found Ryan's prior misdemeanor and felony charges admissible to establish his motive and intent and White's reasonable fear or apprehension, as well as to establish the ongoing pattern required to prove the aggravator. 1RP 153-58; 2RP 235-36.

A jury convicted Ryan as charged. CP 84-89. In addition, the jury found Ryan was armed with a deadly weapon on the felony harassment count. CP 90. Based on the aggravating factor, the court found substantial and compelling reasons to impose a 76-month exceptional sentence. CP 94; 4RP 23-35. Ryan appeals. CP 104-14.

2. Substantive Facts

a. Events Related to Current Charges – June 17, 2009.

Ryan and White had a long-term relationship, which produced two children. 2RP 308-09. Ryan had an ongoing issue with alcohol, while White was addicted to crack cocaine for a period. 2RP 309-10, 326. Ryan

---

. . . .

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time[.]

[6] There are four volumes of verbatim report of proceeding referenced as follows: 1RP – 11/9, 10 & 12/09; 2RP – 11/16 &17/09; 3RP – 11/18/09; 4RP – 12/18/09.

was jealous of White and suspected she was sleeping with her "strictly platonic" friends. 2RP 334-36. Their relationship was marked by incidents of domestic violence, and they repeatedly broke up only to reunite. 2RP 326, 382.

In June 2009, White was a caregiver to an elderly woman named Doris Stelly, and lived in her house, as did Stelly's son Preston Thomas. 2RP 335-36; 3RP 482-83. For a time, Ryan also stayed in the house until Thomas kicked him out in mid-June. 2RP 351-52; 3RP 486. Ryan then stayed in a nearby vacant lot, sleeping in a sleeping bag under a tarp. 2RP 252-53, 345-46, 353; 3RP 486.

On June 17, 2009, Ryan asked White if he could talk with her. 2RP 337, 353. The two went to White's third-floor room and sat together on her bed. 2RP 353-54. Ryan was intoxicated and argumentative. 2RP 336, 353. Ryan said he wanted to get back together with White. 2RP 337-38. When White said she did not want to reunite, Ryan became upset and sat on the edge of the bed crying, emotionally out of control. 2RP 337-38, 402.

At some point, Ryan took out a Swiss Army style folding knife equipped with a flat blade slightly less than three inches long and a box cutter. 1RP 182; 2RP 302-03, 353-54; 3RP 446-47. With the flat blade

opened, Ryan played with the knife hitting his thigh. 2RP 354. Ryan also pointed the knife at White while talking to her. 2RP 340. White said Ryan held the knife about four or five inches from her as he started backing towards the door. 2RP 340. Ryan then came back, sat next to White, and cut his leg with the knife. 2RP 336, 339, 341. White thought he might have cut his leg while trying to close the knife, but she was not certain. 2RP 339-40.

Refreshed by her statement to police, White testified Ryan said, "I will cut you right now;" "I will kill you;" and – referring to their daughters – "They just won't have no mother." 2RP 342. White said Ryan was holding the knife loosely in his hand while he said these things. 2RP 355. White said she was scared, and she felt he might follow through with his threat given his state of mind. 2RP 343. White felt she had to stay quiet to avoid provoking him. 2RP 401. During the course of the incident, Ryan did not hit White, put the knife to her throat, make any stabbing motions towards White, or lunge at her. 2RP 355-56, 401. White acknowledged she was not injured in any way during the incident. 2RP 346.

After he cut his leg, Ryan left, walking either towards a 7-Eleven or towards his campsite in the vacant lot. 2RP 401-02. White followed

Ryan as he left the house and closed and locked the door after him. 2RP 344, 402.

Once outside, Ryan encountered Preston Thomas, who had heard Ryan's voice coming from White's bedroom. 3RP 483. Thomas saw Ryan holding the knife to his side, with what looked like the box cutter blade opened. 3RP 484. Thomas said Ryan looked frustrated and was speaking about his relationship with White and their children. 3RP 484-85. Thomas also said Ryan mentioned something about Thomas having a relationship with White. 3RP 484. Thomas said Ryan left the property and went towards the vacant lot. 3RP 485.

Police were dispatched to a disturbance involving a person with a knife or a razor. 2RP 248-49, 295. Police found Ryan lying under a tarp in a campsite behind a Jersey barrier. 2RP 432-34. Ryan had a large cut on his right thigh. 2RP 254. He was identified based on a description provided by White and arrested without problem. 2RP 258, 297, 300, 433. In a search Ryan incident to arrest, police found a knife. 2RP 302. Following an advisement of rights, Ryan said he had not been involved in an incident and denied being at the address for three days. 2RP 301-02.

b. Prior Acts.

Over objection, the State introduced evidence of prior incidents involving White, which had resulted in Ryan's previous convictions. This

evidence was introduced to support the ongoing pattern of domestic violence aggravator, establish Ryan's motivation, bolster White's credibility in the face of her prior recantations, and support White's claim she feared Ryan would carry out his threats.

The first prior act occurred on January 27, 1999, when White was pregnant. 2RP 310-17. An argument escalated into physical violence with Ryan punching White in the face and choking her until she urinated on herself. 2RP 312-14. At some point White took a hammer out to use in self-defense. 2RP 347-50, 387-88. Ryan took the hammer from her, held it over her head, and threatened to kill her. 2RP 347-50, 388-90, 405. In hope of reconciliation, White subsequently wrote a letter recanting her allegations as to the incident. 2RP 317-18. Ryan was convicted of second-degree assault, and a no contact order was issued. 2RP 317.

The second incident occurred August 7, 1999. 2RP 318-20. There was a no contact order precluding Ryan from being in White's presence, but White was in the process of having it lifted. 2RP 319. White and Ryan, however, were already back together. 2RP 319. They were riding in a taxi when they started arguing. 2RP 318-19. Their argument got out of hand and the police were called. 2RP 319. As a result, Ryan was convicted of misdemeanor violation of a no contact order. 2RP 319-20.

The third incident occurred July 10, 2002. 2RP 320-23. Ryan and White were arguing about money. 2RP 321. Ryan threw a punch at White, missing her face and hitting a cabinet. 2RP 322.

White became upset, left the house, and called police. 2RP 322-23. White acknowledged she may have recanted her allegation during a subsequent defense interview. 2RP 325.

The fourth incident occurred April 4, 2003. 2RP 323-25. White was concerned because Ryan had been drinking and was holding their infant daughter very tightly. 2RP 323. White was screaming at Ryan, and in the course of this altercation, Ryan threw a glass bottle at her. 2RP 323-25. White also acknowledged she may have recanted her allegation regarding this incident during a subsequent defense interview. 2RP 325.

The fifth incident occurred August 4, 2003. 2RP 327-30. White said they had friends over drinking, and it got out of hand. 2RP 327. Ryan slapped White in the face, and she took off running. 2RP 328. Ryan caught her and beat her with his hands and feet. 2RP 328. The incident ended when a family friend intervened. 2RP 328-29. Ryan was subsequently convicted of fighting. 2RP 330; Ex 12.

The sixth prior incident occurred November 23, 2004. 2RP 330-33. This incident involved a choking. 2RP 330. White, however, had no memory of the incident other than recalling an incident when the police

were called and she was intoxicated. 2RP 330-32. The State entered court documents to show Ryan entered an Alford[7] plea to assault in Seattle Municipal Court. Ex 13, 15-16.

C. ARGUMENTS

1. THE COURT'S EXCLUSION OF EVIDENCE THAT WHITE HAD ONCE STABBED RYAN VIOLATED RYAN'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

The Due Process Clause of the Fourteenth Amendment requires criminal prosecutions to comport with "prevailing notions of fundamental fairness." California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). This standard requires that the accused "be afforded a meaningful opportunity to present a complete defense." Id. (emphasis added). Thus, the right of an accused to due process includes the right to a fair opportunity to defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Essential to this fair opportunity is the accused's right to confront and cross-examine the witnesses called against him. Chambers, 410 U.S. at 294. Both our federal and state constitutions guarantee the right to cross-examine adverse witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing U.S. Const. amend 6 and Const. art I, § 22)

[7] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

(requiring disclosure of police drug surveillance location to protect right of cross-examination).

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Thus, the right to cross-examination is more than a desirable rule of trial procedure. Chambers, 410 U.S. at 295. Rather, it is implicit in the constitutional right of confrontation, and helps ensure the accuracy of the truth-determining process. Id. (citations omitted). While the right to cross-examination is not absolute, and may be subject to balancing with other legitimate interests, its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." Id. (citations omitted).

Cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of a witness as they relate to the issues or personalities of the case effects an attack on that witness's credibility. Davis, 415 U.S. at 316. The bias of a witness is subject to exploration at trial and is always relevant towards discrediting the witness and affecting the weight of his or her testimony. Id. When the trial court's evidentiary rulings prohibit counsel from exposing to the jurors facts, from which they could appropriately draw inferences relating to the reliability of a witness,

the defendant has been "denied the right of effective cross-examination which would be constitutional error of the first magnitude[.]" Davis, 415 U.S. at 318 (citation omitted).

Thus, due process requires state evidentiary rules "not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302. Applications of evidence rules that restrict the accused's right to present a defense must not be "arbitrary or disproportionate to the purposes the rules are designed to serve." Rock v. Arkansas [8] Rather, if evidence crucial to the presentation of a complete defense is not admissible under the rules of evidence, the constitutional right to cross-examine the State's witnesses about prior convictions or other misconduct must take precedent over those rules. State v. McDaniel, 83 Wn. App. 179, 188 n.5, 920 P.2d 1218 (1996), rev. denied, 131 Wn.2d 1011 (1997).

In Washington, ER 611(b)[9] provides the trial court with discretion to determine the scope of cross-examination. The trial court's exercise of discretion, however, must be considered within the context of the

---

[8] Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (addressing the right of a defendant to testify).

[9] ER 611(b) -- Scope of Cross Examination -- provides:

> Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

constitutional interests implicated in the right to cross-examine. The evidence sought to be admitted must be relevant, and the defendant's right to introduce such evidence must be balanced against the State's interest in precluding prejudicial evidence that would disrupt the fairness of the fact-finding process. McDaniel, 83 Wn. App. at 185. Before precluding the admission of a defendant's relevant evidence, however, the State must demonstrate a compelling state interest. McDaniel, 83 Wn. App. at 185.

> [I]t is clear that any attempt to limit meaningful cross-examination, whether it be by legislative act, judicial pronouncement or court ruling upon the admissibility of evidence, court rule, or the common law, must be justified by a compelling state interest. Where a statute or court ruling is challenged on grounds that it unduly restricts the Sixth Amendment right to confrontation, the state's interest in the rule must be balanced against the fundamental requirements of the constitution.

McDaniel, 83 Wn. App. at 185-86 (quoting State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)) (emphasis in original, citations omitted).

At issue here is the court's denial of Ryan's right to present a complete defense by cross-examining White about an incident where she was arrested for stabbing Ryan. Pretrial, the State moved to exclude evidence of an altercation between Ryan and White on May 24, 2007, during which White stabbed Ryan in the side, causing him to bleed

profusely. 1RP 44; Pretrial Ex 10.[10] The State argued evidence of this incident would not be relevant unless Ryan was raising a self-defense claim. 1RP 45.

Counsel, however, told the court there were two bases for admitting this evidence. First, the stabbing was relevant to whether White had a reasonable fear or apprehension of Ryan – an element the State had to prove for both charges. Second, the evidence could come in if White opened the door by saying she had never done anything to Ryan. 1RP 46-47. When questioned by the court about whether the stabbing eliminated Ryan's culpability, counsel acknowledged that it did not, but reiterated that the stabbing incident went to the issue of whether White feared Ryan and to her credibility should she open the door. 1RP 47. Reserving its ruling, the court told counsel the incident was not to be referred to during cross-examination unless counsel first brought it to the court's attention outside the presence of the jury. 1RP 48.

At trial, White testified about an instance of domestic violence on August 4, 2003 and said, "I would take off running. I mean I can't physically do too much to George." 2RP 328. At the noon recess, counsel argued this testimony opened the door to cross-examination regarding the

[10] Pretrial Exhibit 10 is a Seattle Police Department record of a witness statement obtained by counsel pursuant to a subpoena duces tecum. 1RP 44. A copy of the exhibit is attached as Appendix B..

stabbing incident. 2RP 370, 377. Counsel also said the stabbing incident was relevant to White's motive to fabricate. 2RP 370. Counsel argued the fact White had been arrested and taken to jail for a serious offense, but had not been charged, gave her a motive to assist the State in this case. 2RP 370, 376-77; cf. Davis v. Alaska, 415 U.S. at 317-18 (cross-examination of prosecution witness's juvenile probation status relevant to inference of undue pressure and witness's possible concern police might suspect him in the actual crime). Counsel further argued the stabbing incident was probative to the issue of whether White actually feared Ryan. 2RP 377.

The court denied counsel's request. 2RP 377. Without considering the particular relevance of the stabbing incident in the context of the trial testimony, the court said:

> The Court: Yeah, and I do think it is not a matter of impeachment under 608, it is more a matter of he did this to me and therefore - - or I did that - - saying that you did that to him is kind of showing that they - - that there are at least allegations that she was engaged in misconduct.
>
> She actually mentioned that once in her testimony, at least once, with getting the hammer, intending to defend herself.
>
> In any event, I am going to deny the motion.

2RP 377-78.

When counsel asked the court to clarify its ruling, the court engaged counsel in a colloquy in which the court expressed confusion

about precisely what the defense was requesting with regard to examining White about the stabbing incident. 2RP 378-80. The record does not show any reason for the court's confusion about what line of inquiry counsel wanted to pursue in cross-examining White. Counsel wanted to ask whether White had stabbed Ryan two years prior to the incident before the court. Counsel had three reasons for pursuing this line of inquiry, and counsel articulated these bases very clearly: bias based on the potential for White to be charged as a motivation to fabricate; impeachment of White's assertion she could not do anything physically to Ryan; and as a basis for the jury to assess White's reasonable fear and apprehension. 2RP 370-71, 376-77.

Impeachment on the first of these bases – witness bias engendered by potential legal jeopardy – was specifically recognized in Davis v. Alaska:

> Here . . . petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender.

Davis, 415 U.S. at 319.

The relevance of the stabbing incident with respect to assessing whether White's fear and apprehension was reasonable is obvious. According to the witness statement regarding the stabbing incident, White was heard to say, "I'll cut you again if I catch you on the rebound," and "It was long overdue." Appendix B. Ryan should have been permitted to cross-examine White regarding these statements as well as the actual stabbing itself because they show she was capable of defending herself against Ryan.

Further, the court magnified the relevance of the stabbing incident when it admitted Ryan's priors for the purpose of assessing White's credibility. 1RP 136-40. The court broadened the rationale, established by the Supreme Court in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), that prior acts of domestic violence are admissible to assist the jury in judging the credibility of a recanting witness, and applied it here, where White did not recant regarding the charged conduct. Rather, to the extent she could remember or be refreshed, White provided testimony about the current incident and each of the prior incidents about which the State inquired.

The rationale applied by the court below was intended to permit the jury to evaluate White's credibility "with full knowledge of the dynamics of her relationship marked by domestic violence and the effect

such a relationship has on the victim." 1RP 138 (quoting State v. Magers, 164 Wn.2d at 186 (internal citations omitted)). Certainly, the 2007 stabbing incident counsel wanted to pursue in cross-examination is a significant aspect of the dynamics of White's relationship with Ryan.

The last incident of prior violence introduced by the State occurred on November 23, 2004 – four and a half years prior to the incident leading to the current charges. During that period two things happened: White stopped using cocaine; and she stabbed Ryan. 1RP 44; 2RP 309-10; Appendix B. It appears both of these events occurred in 2007. Id. Whatever relevance the other prior instances of domestic violence may have had to White's current credibility, White's stabbing of Ryan must also share in that relevance. If credibility was to be assessed by the jury with "full knowledge of the dynamics" of White's and Ryan's relationship, White's stabbing of Ryan is certainly an essential part of that knowledge.

In like manner, White's statement that she could not do anything physically to Ryan opened the door to inquiry about the stabbing incident. 2RP 328. This inquiry would have permitted the jury to assess her general credibility when testifying and to assess her degree of fear and apprehension.

When determining the scope of a criminal defendant's right to cross-examine a state's witness, Washington courts first assess the relevance of the proffered evidence. McDaniel, 83 Wn. App. at 186. Relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. The stabbing incident was obviously relevant to all three bases proposed by counsel, yet the court never addressed the relevance of the stabbing to any of counsel's three proffered lines of cross-examination. Cf. McDaniel, 83 Wn. App. at 186 (relevance of the evidence to the defense is the first analytical step required before the court can limit the right to cross-examine the state's witnesses).

The second element to be considered is whether the State has presented a compelling interest to support excluding the cross-examination. McDaniel, 83 Wn. App. at 187. In Davis, the Court balanced the defendant's right to confront by meaningful cross-examination against a state policy intended to protect juvenile offenders, and found the defendant's right required vindication -- not only by counsel being permitted to inquire as to the witness's juvenile probation status, but also by being permitted to follow up an initial denial with full cross-examination.

> On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis, 415 U.S. at 318.

Again here, the court below did not make any inquiry into the State's interests in excluding Ryan's proposed cross-examination regarding the stabbing incident. Nor does the record reveal that the State forwarded any such interest, compelling or otherwise. Thus, the court's refusal to allow Ryan to cross-examine White about the stabbing incident was both an abuse of discretion and a denial of a fundamental constitutional right.

Further, this constitutional error was prejudicial. The only evidence of what occurred in White's bedroom came from White. The State's entire case rested on her credibility. At issue in both charges was White's assessment of the danger she may or may not have experienced while she was in the room with Ryan.

To convict on assault, the State had to prove White experienced "a reasonable apprehension and imminent fear of bodily injury." RCW 9A.36.021(1)(c); CP 68-69. To convict on harassment, the State had to prove White experienced "a reasonable fear that the threat to kill would be

carried out[.]" RCW 9A.46.020(1), (2); CP 72. Initially, defense counsel below argued evidence of the prior incidents were not necessary to prove reasonable fear or apprehension because the fact of the knife would be sufficient. 1RP 100-01, 106.

In response, the State made a compelling argument for why reasonable fear and apprehension was very much at issue. Arguing in favor of admitting the prior incidents, the State said:

> Yes she is threatened with a knife, but the facts of the case are not the knife being up to her throat. The facts of the case are actually the defendant kind of playing with and waiving the knife around at least a foot from her.
>
> There is a difference in that because I do think that reasonable fear is an issue for the jury to decide, and I do think there is an argument – I don't know – obviously I am playing devil's advocate as a defense attorney in this sense, but I do think there would be a defense argument that because the knife was not to her throat, and because the knife was a foot away from her face, that her fear would not be reasonable just based on his actions; rather, the fear is reasonable based on the actions at that time, his statement, as well as the prior instances.

1RP 109-10.

The State carried the day on that argument when the court admitted the prior incidents as relevant to show White's reasonable fear. By asking to include cross-examination on the stabbing incident, counsel merely sought to permit the jury to assess the reasonable fear and apprehension

elements within the complete context of the relationship. As the State's argument shows, that context was crucial for assessing those elements.

White's testimony also provided the jury with points to consider in assessing the reasonable fear and apprehension elements. White described Ryan as "playing" with the knife, "Just flicking around, just playing with it. And then talking to me and pointing at me and then just playing with it." 2RP 354. White testified she was frightened and thought there was a chance he might carry out his threats, but she also testified about controlling her own speech to prevent an escalation, indicating her ability to influence the situation to a certain degree. 2RP 342-43. White also said Ryan may have been trying to close the knife when he cut himself. 2RP 339-40. White's response once Ryan had left the room was to follow immediately behind him, right on his heels, down the stairs, which also does not immediately suggest fear or apprehension. 2RP 358. The first officer to contact White arrived within minutes of the 911 call, and he recalled her demeanor as "calm." 1RP 167-68; 2RP 250, 296.

The question for the jury was whether White's subjective expressions of fear rose to the objective "reasonable apprehension and imminent fear of bodily harm" and the objective "reasonable fear that the threat to kill would be carried out" required to prove the two charges. The jurors in their deliberations seemed to have some difficulty, however,

assessing the degree of White's fear that Ryan's threat to kill would be carried out. The jury sent the court an inquiry, asking "On the crime of criminal harassment, is there a minimum length of time that the victim needs to be in fear of their life to meet the requirements for Page 12, element 2." CP 55 (referencing the "to convict" instruction for Felony Harassment).

Given the jury's questioning of White's degree of fear, cross-examination into the stabbing incident could have swayed the jury to acquit on, at least, the felony harassment charge. As the State acknowledged early in the proceedings, there was very little practical difference between the fear and apprehension elements of both charges. 1RP 29-30. The jury question on the harassment charge shows they were looking closely at White's degree of fear. Cross-examination on the stabbing incident would have provided the jury a complete context of the relationship within which to assess these elements for both charges.

This Court cannot be certain beyond a reasonable doubt that the trial court's constitutional error denying Ryan an opportunity for meaningful cross-examination did not affect the outcome of the trial. Reversal is required.

2. THE ERRONEOUS JURY INSTRUCTION REQUIRING UNANIMITY TO ANSWER "NO" ON THE AGGRAVATOR AND ENHANCEMENT SPECIAL VERDICTS REQUIRE REVERSAL OF THOSE FINDINGS AND VACATION OF THE SENTENCE.

Regarding the aggravating circumstance and the deadly weapon enhancement allegations, the court instructed the jury that unanimity was required to answer "no" on the special verdicts. The Supreme Court, however, has previously determined that unanimity is not required to answer a special verdict in the negative. State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003). The Court recently reaffirmed its holding in Goldberg and vacated two school bus zone drug offense sentencing enhancements. State v. Bashaw, No. 81633-6, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 2615794 (July 1, 2010). At issue in Bashaw was an instruction that required all twelve of the jurors to agree on the answer to the special verdict. Here, the instructions on the special verdicts were even more explicit in requiring a unanimous jury to answer negatively. Bashaw is directly on point. Reversal of the deadly weapon enhancement on Count 2 and the aggravating circumstance findings on both Counts 1 and 2 is required. As a result, the exceptional sentence entered below should be vacated, and this case should be remanded for entry of a standard range sentence.

In Goldberg, the defendant was charged with aggravated first degree murder. Goldberg, 149 Wn.2d at 890. The trial court's instruction on answering the special verdict stated, "In order to answer the special verdict form "yes", you must *unanimously* be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no." Id. at 893.

The jury returned with their verdict convicting on the substantive offense, and initially answered "no" on the special verdict form addressing the aggravating circumstance. Id. at 891. When the jury was polled, only one juror acknowledged voting "no," while two others had in fact voted "no" but did not acknowledge their votes in open court. Id. The court inquired whether the jury could reach unanimity on the special verdict, and the presiding juror said there was no probability of reaching a unanimous verdict on the aggravating circumstance within a reasonable time. Id. The court released the jury for the night with instructions to return the next morning to resume deliberations on the special verdict. Id. The jury resumed deliberations the next morning, and returned a unanimous finding that the State had proved the aggravating factor. Id. at 891-92.

The Supreme Court vacated the finding on the aggravating factor. Id. at 894. The Court said the issue was whether unanimity was required

to answer "no" on such special verdicts, and held it was not. Id. at 893. On remand, Goldberg received a standard range sentence.[11]

In Bashaw, the defendant had been convicted of three counts of delivery of a controlled substance, and the State alleged three school bus zone enhancements. Bashaw, 2010 WL 2615794 at ¶ 2, 6. The court's instruction regarding the special verdict forms for determining the enhancements said, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at ¶ 5. The jury returned a unanimous finding of a guilty on all three substantive counts and found each had occurred within a school bus stop zone. Id. at ¶ 6.

Reversing the enhancements,[12] the Bashaw Court applied the "Goldberg rule:"

> The rule from Goldberg, then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A no unanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.

Bashaw, at ¶ 21.

---

[11] See State v. Goldberg, 123 Wn. App. 848, 851, 99 P.3d 924 (2004) (Goldberg II) (on remand, in pre-Blakely context, trial court gave standard range sentence to ensure finality).

[12] The Bashaw Court had reversed one of the enhancements on a different basis earlier in the opinion. Bashaw, 2010 WL 2615794 at ¶ 18. Application of the Goldberg rule resulted in the reversal of the two remaining enhancements. Id. at ¶ 25.

Applying this rule to the instruction given at trial, the Bashaw Court said the jury instruction requiring all twelve jurors to agree on an answer to the special verdict was an incorrect statement of law. Bashaw, at ¶ 23. "Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the absence of such a special finding." Bashaw, at ¶ 23 (emphasis and citation in original). Having found legal error, the Court further determined that error could not be found harmless beyond a reasonable doubt. Id. at ¶ 25.

The Bashaw Court noted the Goldberg rule was not compelled by double jeopardy concerns, but rather by the common law precedent of the Court. Bashaw, at ¶ 21 n.7. The evil addressed by the Goldberg rule, however, can be found in the Bashaw Court's harmless error analysis. Rejecting the State's – and Court of Appeals' – argument that any instructional error was harmless because the jury had been polled and had affirmed the verdicts, the Supreme Court said:

> The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's instruction to a no unanimous jury to reach unanimity. 149 Wn.2d at 893. The error here is identical except for the fact that the direction to reach unanimity was given preemptively.
>
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative.

> There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Bashaw, at ¶¶ 24-25.

Bashaw is directly on point. Here, the court's instruction on the special verdict forms explicitly required a unanimous verdict in order to answer "no."

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

Appendix A.

If anything, the explicit requirement for jury unanimity to answer the special verdict "no" here is a more egregious misstatement of the law than the instructions in Bashaw or Goldberg, with their implicit negative-unanimity instruction. Here, as in Bashaw, the jury returned unanimous written affirmative verdicts on the aggravators, and the enhancement,

based on the erroneous unanimity instruction.[13] CP 85-86, 88-90; Bashaw, at ¶ 23. Thus, as in Bashaw, "The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Bashaw, at ¶ 25. This error requires Ryan's aggravating factors on Counts 1 and 2 – and the deadly weapon enhancement on Count 2 – be reversed. As a result, Ryan's exceptional sentence should also be reversed.

3. THE COURT'S FAILURE TO ENTER WRITTEN FINDINGS AND CONCLUSIONS IN SUPPORT OF THE EXCEPTIONAL SENTENCE REQUIRES REMAND FOR THEIR ENTRY.

Whenever a court imposes a sentence outside of the standard range, the court is required to provide written findings of fact and conclusions of law stating the reasons for the departure. RCW 9.94A.535.[14] Review of an exceptional sentence requires an appellate

[13] The transcript in this appeal does not include the return of the verdict. The minutes of the trial, however, show the jury was polled, and "12 jurors indicate that these are their individual and collective verdicts." Supp. CP ___ (sub no. 45A, Jury Trial Minutes,11/9/09).

[14] RCW 9.94A.535 provides in part:

> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

court to address the reasons provided by the sentencing court. RCW 9.94A.585(4).[15]

Written findings and conclusions enable appellants to focus on issues arguably supported by the record and avoid pursuing issues obviously lacking merit. State v. Head, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). Thus, the purpose for requiring written findings and conclusions is to enable appellate courts to review issues raised on appeal. Head, 136 Wn.2d at 622.

A trial court's oral opinion is no more than an oral expression of the court's informal opinion at the time rendered, and it has no final or binding effect unless formally incorporated into findings and conclusions. Head, 136 Wn.2d at 622. Thus, when a trial court fails to issue findings of fact and conclusions of law, the remedy is ordinarily remand for the entry of the findings. In re Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999); see also Head, 136 Wn.2d at 622 (remand for entry of written findings and conclusions is the proper course).

---

[15] RCW 9.94A.585(4) provides:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

The court here failed to enter written findings of fact and conclusions of law in support of its exceptional sentence. The court stated orally various reasons why an exceptional sentence might be appropriate. 4RP 23-25. The court did identify the history of domestic violence as "substantial and compelling reasons for an exceptional sentence[.]" 4RP 24 (emphasis added). The court, however, did not specify whether it was relying on other reasons to support its exceptional sentence.

At the end of the sentencing hearing, the trial prosecutor said she would prepare the findings. 4RP 27. Those findings do not, however, appear in the court docket. Remand is required for entry of the required written findings and conclusions.

D. CONCLUSION

Because the court violated Ryan's right to present a complete defense, this Court should reverse.

Because the special verdicts in this case were the product of an erroneous instruction, this Court should vacate the special aggravator verdict findings on Counts 1 and 2, and the deadly weapons enhancement on Count 2. This Court should also reverse the exceptional sentence.

Because the court failed to enter written findings and conclusions regarding its imposition of an exceptional sentence, remand is required for entry of such findings.

DATED this 21st day of July 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

WSBA 25097

HARLAN R. DORFMAN
WSBA No. 25375

CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

Appendix A

No. 18

You will also be given Special Verdict Form A-2 for the crimes of Assault in the Second Degree, charged in Count I, as well as Special Verdict Forms B-2 and B-3 for the crime of Felony Harassment, charged in Count II.

If you find the defendant not guilty of Assault in the Second Degree, as charged in Count I, do not use Special Verdict Form A-2. If you find the defendant guilty of Assault in the Second Degree, you will use Special Verdict Form A-2 and fill in the blank with the answers "yes" or "no" according to the decision you reach.

If you find the defendant not guilty of Felony Harassment as charged in Count II, do not use Special Verdict Forms B-2 and B-3. If you find the defendant guilty of Felony Harassment, as charged in Count II, you will use Special Verdict Forms B-2 and B-3 and fill in the blanks with the answers "yes" or "no" according to the decisions you reach.

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

Appendix B

SEATTLE POLICE DEPARTMENT

STATEMENT FORM

INCIDENT NUMBER: 07-206786
UNIT FILE NUMBER:

DATE	TIME	PLACE
05-24-2007	0438	1541 VALENTINE PL S.

STATEMENT OF: ☒ COMPLAINANT ☒ WITNESS ☐ VICTIM ☐ OFFICER ☐ OTHER

NAME (LAST, FIRST, M.I.): [redacted] DOB: [redacted]990

I LIVE AT 1541 VALENTINE PLS. I GO TO FRANKLIN HIGH SCHOOL. AT ABOUT 0330 HRS THIS MORNING, "GEORGE," CAME UPSTAIRS TO THE LIVING ROOM. HE WASN'T WEARING A SHIRT. HE WAS BLEEDING PROFOSELY FROM HIS TORSO. "YVETTE" CAME UPSTAIRS TOO. GEORGE SAID, "THIS BITCH CUT ME," AND POINTED TO YVETTE. GEORGE TOLD YVETTE TO LEAVE. YVETTE TOLD GEORGE, "I'LL CUT YOU AGAIN IF I CATCH YOU ON THE REBOUND." GEORGE WAS BLEEDING REALLY BAD. I CALLED 911. GEORGE WENT DOWNSTAIRS TO THE BASEMENT, WHERE HE STAYS. IT WAS THE LAST I SAW OF HIM. YVETTE STAYED UPSTAIRS AND STARTED CLEANING UP GEORGE'S BLOOD FROM THE KITCHEN FLOOR. THE POLICE SHOWED UP. I GAVE OFFICER HOWARD THIS STATEMENT. I HEARD YVETTE SAY, "IT WAS LONG OVERDUE," IN FRONT OF THE POLICE IN THE LIVING ROOM.

Defendant's Exhibit 10 pt
09-1-04547-6 SEA
State v. Ryan
FILED
KING COUNTY, WASHINGTON
NOV 17 2009
SUPERIOR COURT CLERK
JON SCHROEDER
DEPUTY

WITNESS [redacted]

WITNESS	STATEMENT TAKEN BY	UNIT

TRANSCRIBED BY (Taped / Translated Statements)	SERIAL	UNIT	SUPERVISOR	SERIAL

Form 9.28 CS 21.122 Rev 1/98

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. George Ryan

No. 64726-1-I

Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

George Ryan 795324
Washington State Penintentiary
1313 N 13th Ave
Walla Walla, WA 99362

Containing a copy of the brief of appellant, in State v. George Ryan, Cause No. 64726-1-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
Done in Seattle, Washington

7-21-10
Date